Supreme Court, U. S.
FILED
DEC 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-13

GARRELL S. MULLANEY, *et al.*,

Petitioners,

v.

STILLMAN E. WILBUR, JR.,

Respondent.

BRIEF FOR RESPONDENT

PETER J. RUBIN
Bernstein, Shur, Sawyer & Nelson
One Monument Square
Portland, Maine 04111
Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT:

I. THE HISTORY OF MURDER AND MANSLAUGHTER IN MAINE IS AT ODDS WITH THE CONCEPT OF A SINGLE GENERIC CRIME OF FELONIOUS HOMICIDE WHICH ALSO PRESENTS SERIOUS QUESTIONS OF INTERNAL INCONSISTENCY 7

II. IT VIOLATED DUE PROCESS OF LAW TO CHARGE THE JURY IN THE PROSECUTION FOR MURDER IN THIS CASE THAT MALICE AFORETHOUGHT WAS TO BE PRESUMED BECAUSE THE TRIAL COURT DEFINED MALICE AFORETHOUGHT IN TERMS OF THE CONCEPT OF INTENTIONAL WHICH IS CLEARLY AN ELEMENT OF THE CRIME WHICH THE STATE MUST PROVE BEYOND A REASONABLE DOUBT PURSUANT TO *IN RE WINSHIP*, 397 U.S. 358 (1970) 14

III. IT VIOLATED DUE PROCESS TO CHARGE THE JURY IN THE PROSECUTION FOR MURDER IN THIS CASE THAT THE DEFENDANT HAD THE BURDEN TO PROVE HEAT OF PASSION ON SUDDEN PROVOCATION BECAUSE IT OFFENDS NOTIONS OF FUNDAMENTAL JUSTICE AND VIOLATES *IN RE WINSHIP*, 397 U.S. 358 (1970) 18

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: *Page*

Bouie v. City of Columbia, 378 U.S. 347 (1964) 12

Commonwealth v. O'Neal, 441 Pa. 17, 271 A.2d 497 (1970) 9, 20

Commonwealth v. Wucherer, 351 Pa. 305, 41 A.2d 574 (1945) 9

Duncan v. Louisiana, 391 U.S. 145 (1968) 22

In re Gault, 387 U.S. 1 (1967) 20

In re Winship, 397 U.S. 358 (1970) . .5, 6, 12, 19, 20, 21, 23, 25

Leary v. United States, 395 U.S. 6 (1969) 16

Palko v. Connecticut, 302 U.S. 319 (1937) 25

People v. Morrin, 51 Mich. App. 301, 187 N.W. 2d 434 (1971) 20

State v. Cuevas, 53 Haw. 110, 488 P.2d 322 (1971) 20

State v. Ferris, 249 A.2d 523 (Me. 1969) 21, 22

State v. Lafferty, 309 A.2d 647 (Me. 1973) . .3, 4, 7, 10, 12, 23

State v. Merry, 136 Me. 243, 8 A.2d 143 (1939) 8

State v. Millett, 273 A.2d 504 (Me. 1971) 23

State v. Park, 159 Me. 328, 193 A.2d 1 (1963) 8

State v. Pond, 125 Me. 453, 134 A. 572 (1926) 10

State v. Rollins, 295 A.2d 914 (Me. 1972) 8

State v. Wilbur, 278 A.2d 139 (Me. 1971) 8, 16, 19, 23

State v. Wright, 16 So. 366, 46 La. Ann. 1403 (1844) 9

Tot v. United States, 319 U.S. 363 (1943) 16

Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973) 8, 11

Wilbur v. Mullaney, 496 F.2d 1303 (1st Cir. 1974) . . . 11, 24

Statutes and Regulations:

15 M.R.S.A. §751 (1964) 8

17 M.R.S.A. §2551 (1964) 8, 25

Page

17 M.R.S.A. §2651 (1964) 8, 21

29 M.R.S.A. §1315 (1964) 10

Miscellaneous:

Comment, *Due Process and Supremacy as Foundations For the Adequacy Rule: The Remains of Federalism After Wilbur v. Mullaney*, 26 U. Me. L. Rev. 37 (1974) 12, 13, 19, 21

Documents of the House of Representatives #26 (February 9, 1836) 9

Resolves of Maine Ch. 74, p. 233 (1836-1839) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-13

GARRELL S. MULLANEY, *et al.*,

Petitioners,

v.

STILLMAN E. WILBUR, JR.,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In order to put the issues in this case in proper perspective, it is necessary to amplify on the State's statement of the case by referring to certain important excerpts from the trial judge's charge.

In opening his charge, the trial judge discussed murder and manslaughter as follows:

> And I will have occasion a little later on when I describe the elements of the crimes of murder and manslaughter to speak of a situation where the law

presumes that a killing under certain conditions is with malice aforethought. (A. 20).

He then went on to say that malice aforethought "is an essential and indispensable element of the crime of murder" (A. 40) and he defined malice aforethought as follows:

> Malice includes that generally malignancy and disregard for human life which proceeds from a heart void of social duty and fatally bent on mischief. That's very ancient language, but it still is quite expressive. Malice includes that general malignancy and disregard of human life which proceeds from a heart void of social duty and fatally bent on mischief. A wrongful act, in modern language, a wrongful act known to be such and intentionally done without just cause or excuse constitutes malice at law. (A. 40)
>
> * * *
>
> What do we mean when we use the term malice aforethought? It means that there must be at least a momentary consideration before the killing. And a premediated design to kill. Remember, for there to be murder there must be malice aforethought. But that malice aforethought may be either expressed or implied. Now, I'm explaining to you what express malice aforethought means. In a moment I'll tell you what implied malice aforethought means. Express malice aforethought means that there must be at least a momentary consideration before the killing, and a premediated design to kill. (A. 41-42).
>
> * * *

> That malice aforethought is implied by law from any deliberate crual act committed by one person against another suddenly or without a considerable provocation. (A. 43)[1]

The trial judge then went on to contrast heat of passion on sudden provocation with malice aforethought in the following terms:

> And malice, even implied malice must be absent or even overcome by such heat of passion. (A. 47)
>
> * * *
>
> In our State all unlawful killings of a human being are presumed to be with malice aforethought. That is, malice aforethought is implied in all unlawful killings. And in a case where the defendant is charged with an unlawful killing of a human being, and when the jury is satisfied that the killing was an unlawful killing, then the defendant in such a case has the burden of satisfying the jury by a fair preponderance of the evidence that the killing was done on sudden provocation in the heat of passion. Then from all the evidence in the case, or I should say, if from all the evidence in this case, you are convinced by a fair preponderance of the evidence, that the killing was done on sudden provocation in the heat of passion, and if you are satisfied by a fair preponderance of the evidence that it was not done with malice aforethought, then the crime

[1] In describing malice aforethought as an essential element of murder and in giving the concept of malice aforethought factual significance, the trial judge was completely inconsistent with the analysis of the Maine Supreme Judicial Court in *State v. Lafferty*, 309 A.2d 647, 664, 666, 672 (Me. 1973). *Lafferty* held that the crime is felonious homicide which is punishable as murder or manslaughter and therefore malice aforethought is not an element of the crime but only goes to punishment. Furthermore, *Lafferty* states that malice aforethought is not even a fact, but is only a statement of public policy.

> would be manslaughter and not murder. You see, malice aforethought and heat of passion on sudden provocation are two inconsistent things. If there is – if the crime is done with – in the heat of passion upon sudden provocation, then there is no malice aforethought. If – and if the – if you have been satisfied from all the evidence in the case by a fair preponderance of that evidence, that this offense was committed in the heat of passion upon sudden provocation, as I have defined those words, then they would not be done with implied malice aforethought and the offense would be manslaughter. (A. 62).

By charging that the two concepts of "heat of passion" and "malice "aforethought" are mutually exclusive, the trial court was saying that there cannot be a subjective intent to kill (express malice aforethought) or deliberate cruel act committed without considerable provocation (implied malice aforethought) if the killing was done in the heat of passion on sudden provocation. This description of the law is also completely inconsistent with the rule of law set forth in *State v. Lafferty*, 309 A.2d 647, 670-72 (Me. 1973). Although *Lafferty* states that the Defendant's burden of proof is only to prove heat of passion on sudden provocation which does not extinguish intent as defined in *Lafferty*,[2] the trial judge told the jury that the Defendant's burden was not only to prove heat of passion on sudden provocation, but also, in doing so, to extinguish malice aforethought which the

[2] *Lafferty* defines "intentional" as being not only a "voluntary act", but also the actor must either have a "specific subjective intention to cause death" or the death must result from "conduct which objectively evaluated is characterized by high death producing potential. 309 A.2d at 669, 671.

trial judge had already defined in the same terms that *Lafferty* defined intentional. Thus, while *Lafferty* states that intent and heat of passion exist together, the trial judge said they do not.

What has really happened is that the Maine Court in *Lafferty* has stated that malice aforethought is not a fact because it has transferred the factual substance of malice aforethought from malice aforethought to its separate definition of "intentional". However, the trial judge's charge places a much heavier burden on the Defendant than even *Lafferty* imposes because the Defendant must disprove malice aforethought with its factual significance.

This statement of the underlying conflict between *Lafferty* and the charge will serve as the basis for the discussion in the argument of other possible due process violations and inconsistencies and problems which may be created by not applying *In re Winship*, 397 U.S. 358 (1970), to the facts of this case.

SUMMARY OF ARGUMENT

Although the Maine Supreme Judicial Court has recently interpreted Maine law in such a way that there is the single crime of "felonious homicide" which is punishable as murder or manslaughter, that interpretation is not binding on this Court and the charge in this case and the law of Maine, as now interpreted, even if binding, violate the Due Process clause of the Fourteenth Amendment to the Constitution.

The State's explanation of the Maine concept of felonious homicide is a sudden, new interpretation which is inconsistent with the history of the develop-

ment of the law of murder and raises several questions which tend to make the concept internally and analytically inconsistent. For example, if there is *one crime* which is established by proof of an intentional and unlawful killing, then the State's primary thesis that involuntary manslaughter is included within the concept of felonious homicide is analytically incorrect. In explaining involuntary manslaughter, the State argues that "a subjective intention to kill or to commit an unlawful act which has a high objective tendency to produce death" is *absent*. However, in proving felonious homicide the State concedes that it must prove intent. If intent is absent in involuntary manslaughter, then it cannot be a part of the concept of felonious homicide. In order to preserve the integrity of Federal constitutional protections, a Federal court should not be bound to accept a recent state court interpretation of its law which is internally inconsistent and contrary to prior state law.

Reading the trial judge's charge closely reveals that he included the *Lafferty* definition of "intentional" within the concept of malice aforethought. Since he then charged that malice aforethought is presumed, he violated the holding of *In re Winship, supra*, on the issue of intent which all parties agree is an element of the crime no matter how it is defined and must be proven by the State beyond a reasonable doubt.

Placing the burden of proof as to heat of passion on sudden provocation on the Defendant also violates the underlying rational of *In re Winship, supra*. The Court in *Winship* based its holding on the stigma which attaches to conviction of a crime and the possibility of imprisonment. The significant differences in stigma and

length of incarceration between murder and manslaughter make the *Winship* rational applicable to the facts of this case, and therefore, the State should have the burden of proof as to all matters which determine whether a defendant is guilty of murder or manslaughter. Furthermore, in the past and at present, when the State only charges manslaughter, it has the burden of proof as to heat of passion on sudden provocation. However, the State can avoid that burden of proof by charging a defendant with murder and thus transfer the burden of proof on the *same* fact to the defendant. Such discretion in the State violates concepts of fundamental fairness. By placing the burden of proof on the State, whether charged with murder or manslaughter, there would be no advantage to the State charging murder.

ARGUMENT

I.

THE HISTORY OF MURDER AND MANSLAUGHTER IN MAINE IS AT ODDS WITH THE CONCEPT OF A SINGLE GENERIC CRIME OF FELONIOUS HOMICIDE WHICH ALSO PRESENTS SERIOUS QUESTIONS OF INTERNAL INCONSISTENCY.

The State, in its brief, outlines the concept of felonious homicide in Maine and states that murder and manslaughter have never been separate crimes, but are punishment categories for the single crime of "felonious homicide." *State v. Lafferty, supra*; *State v. Rollins*, 295

A.2d 914 (Me. 1972); *State v. Wilbur*, 278 A.2d 139 (Me. 1971).

In order to put this concept in its proper perspective, there are many aspects of the law of Maine which are inconsistent with the concept that there is only one crime of felonious homicide. *Wilbur v. Mullaney*, 473 F.2d 943 (1st Cir. 1973).

Indictments, in Maine, speak of murder and manslaughter but do not refer to the crime of felonious homicide. This remains true even after *Lafferty* and *Rollins*. 15 M.R.S.A. §751.

There are two separate statutory provisions which define murder and manslaughter. 17 M.R.S.A. §2651 (1964) and 17 M.R.S.A. §2551 (1964). No statute refers to the concept of felonious homicide.

Previous Maine cases have recognized that murder is a separate crime. In *State v. Merry*, 136 Me. 243, 8 A.2d 143 (1939) the Maine Court stated that "in this State degrees of murder have been abolished. The crime (murder) is now defined by statute as the unlawful killing of a human being, with malice aforethought, either express or implied." 136 Me. at 246. The *Merry* Court went on to say that when a person is charged with murder, malice aforethought must exist and must "*as any other elemental fact*, be established, not beyond all reasonable doubt, but beyond a reasonable doubt" (emphasis supplied). 136 Me. at 247-48. *See State v. Park*, 159 Me. 328, 193 A.2d 1 (1963).

As early as 1836, in the context of discussing the meaning of the Maine constitutional provision on what is a bailable offense, the Supreme Judicial Court was asked to render an opinion to the Legislature on the question of "If the Legislature shall abolish the

punishment of death, will the crime of murder become, by the Constitution, a bailable offense?" *Documents of the House of Representatives*, #26, February 9, 1836. The whole premise of the Maine Court's discussion is that murder is a crime. There is no reference to murder as a component part of the crime of felonious homicide. The legislative response to this opinion, contained in Chapter 74 of the Resolves of Maine (1836-1839) at page 223, also refers to "the crimes of Treason, Murder and Arson."

The State also refers to statutes of four other states to support the Maine law of felonious homicide. However, an examination of those statutes reveals that they are a major departure from the common law concepts of murder and manslaughter. The common law in those states, prior to the new statutes being enacted, seems to run counter to the Maine law concepts that malice aforethought is not a fact[3] and that it is not an element of the crime. *Commonwealth v. O'Neal*, 441 Pa. 17, 271 A.2d 497, 499 n.1 (1970); *Commonwealth v. Wucherer*, 351 Pa. 305, 41 A.2d 574, 577 (1945); *State v. Wright*, 16 So. 366, 367, 46 La. Ann. 1403 (1844).

Examining the concept of felonious homicide as it is presently interpreted reveals a major problem of interpretation. The State argues that felonious homicide includes murder, voluntary manslaughter and involun-

[3] If malice aforethought is only a statement of policy and not a fact, there really is no need to ever have invented the concept of malice aforethought. The courts could merely have told a jury that once certain facts were proven, there arises a presumption that it is murder, unless the defendant proves otherwise.

tary manslaughter.[4] The most important element of the crime of felonious homicide is that the killing be intentional as defined in *State v. Lafferty, supra* at 669-672. Intention is an element of the crime and, under *Winship*, the State must prove, beyond a reasonable doubt, that the killing was intentional.

However, in describing involuntary manslaughter, the State argues that involuntary manslaughter is an unintended killing, thus not involving either "subjective intent to kill or an objectively characterized high death-producing potential." In *State v. Pond*, 125 Me. 453, 456, 134 A.572 (1926), involuntary manslaughter is described as a killing caused by gross carelessness or negligence. If the State's position that intent is always an element of felonoius homicide is accepted, then involuntary manslaughter cannot be a degree of that "crime" because there is no intent in the *Lafferty* sense. The State attempts to avoid this inconsistency in its analysis of involuntary manslaughter by omitting "intent" in its enumeration of the elements of the crime of felonious homicide (footnote 5 on page 10 of State's brief). However, *Lafferty* clearly states that

[4] To be consistent with the concept of a single generic offense of felonious homicide, "reckless homicide", 29 M.R.S.A. §1315 (1964) should be included within the concept. However, the elements of reckless homicide do not include the element of intent since, by definition, it must be reckless. Would the presumption of malice aforethought permit a finding of murder and place the burden of proof on the defendant to show that it was only reckless? Driving a car could certainly be construed to fit within the definition of acts with a high objective potential for death as defined in *State v. Lafferty*, 309 A.2d 647 (Me. 1973).

intent is an element of the crime of felonious homicide.[5]

Even though the above matters raise a serious question as to the strength of the foundation for the Maine Supreme Judicial Court's recent interpretations in *Lafferty* and *Rollins*, this issue was rejected by the First Circuit on remand. *Wilbur v. Mullaney*, 496 F.2d 1303 (1st Cir. 1974).

The second *Wilbur v. Mullaney, supra*, decision was handed down after this Court remanded "for further consideration in light of *State v. Lafferty*, Me., 309 A.2d 647 (1973)." (A. 128). In the first *Wilbur v. Mullaney, supra*, decision the Maine Court's interpretation of Maine law as to felonious homicide and malice aforethought was rejected by the First Circuit on the ground that "a totally unsupportable construction which leads to an invasion of constitutional due process is a federal matter."[6] 473 F.2d at 945. The First Circuit found that this was a "sudden" and "new" interpretation of Maine law. Even the Maine Court, in *Lafferty*,

[5] Even accepting the State's concept that involuntary manslaughter is a degree of felonious homicide, the State must first introduce sufficient evidence to prove an intentional and unlawful killing. Then the burden of proof, not the burden of going forward, as to involuntary manslaughter is placed on the defendant. The defendant must prove, by a preponderance of the evidence, that the killing was not intentional, but was committed by acts of gross negligence. Although the State claims to retain the burden of proof as to intent, it is shifted to the defendant. The defendant must do more than come forward with evidence which raises a reasonable doubt; he must prove, by a preponderance of the evidence, that the killing was unintentional.

[6] Judge Gignoux, in the District Court, also rejected the Maine Court's interpretation, stating that the concept of the crime of felonious homicide appears nowhere in the statutes and malice aforethought is "undeniably an essential element of the crime of murder." (A. 113-114).

recognizes that "if the totality of the circumstances surrounding the State Court's recent interpretation under scrutiny establishes that it is at odds with the fundamental spirit which has always pervaded the State's law, the federal tribunal ... may reject such recent State Court interpretations thus to preserve the integrity of federal constitutional protection." 309 A.2d at 668 and see cases cited therein. In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court also adopted a rule that a sudden, new interpretation of state law which prejudices a defendant violates due process. The First Circuit and the District Court have found, either expressly or impliedly, that the recent Maine Court interpretations could not be anticipated.

Although there is not the same prejudice to the Defendant as there was in *Bouie*, the Maine Court did strip malice aforethought of its factual content. In doing so, the State can now argue that since malice aforethought is not a fact, the rational of *In re Winship, supra,* is inapplicable. However, the trial proceeded on the basis that it was an "essential element of the crime of murder" (A. 40) and that malice aforethought was factual in nature (A. 40, 41-42, 43). By redefining malice aforethought, the Defendant is being deprived of a federal constitutional right which is clearly applicable to the law as defined by the trial court and historical precedent. The "*ex post facto* refooting of an already existing practice may offend due process." *Comment, Due Process and Supremacy As Foundations for the Adequacy Rule: The Remains of Federalism After Wilbur v. Mullaney*, 26 U. Me. L. Rev. 37, 70 (1974).[7]

If this Court rejects the Maine Court's interpretation

[7]Other due process violations, arising out of the differences between the law as defined by the trial court and the Maine Supreme Judicial Court may also exist. If, as the State contends, heat of passion on sudden provocation and intent are not mutually exclusive, (see p. 11-12 of State's brief), then the trial judge violated Maine law in charging that the heat of passion extinguishes malice aforethought which he had already defined as requiring a subjective intent to kill or a deliberate cruel act (implied intent) (A. 40-42, 47, 62). He defined heat of passion on sudden provocation as follows:

> "Heat of passion means more than anger. It means that at the time of the act the reason is disturbed or obscured by passion to an extent which might ordinary men of fair, average disposition liable to act irrationally without due deliberation or reflection, and from passion rather than judgment. The state of mind must be such that the suddenly excited passion suspends the exercise of judgment and dominates volition so as to exclude premeditation and a previously formed design, though of short duration.... Moreover, heat of passion will not avail unless upon sudden provocation. Sudden means happening without previous notice or with very brief notice; coming unexpectedly, precipated, or unlooked for." (A. 47).

By so doing, the trial judge imposed a much heavier burden of proof on the Defendant than even *Lafferty* requires. Rather than merely proving heat of passion, he must also disprove malice aforethought as factually equated with intent by the trial judge. *Comment, Due Process and Supremacy As Foundations for the Adequacy Rule: The Remains of Federalism After Wilbur v. Mullaney*, 26 U. Me. L. Rev. 37, 75 & n. 169 (1974). As the factual definition of malice aforethought becomes more stringent, the burden on the Defendant becomes more difficult. If malice aforethought has no factual substance, then it was highly prejudicial to the Defendant to give it any. Such an inconsistency with state law should be a due process violation in and of itself. If *Lafferty* is good law, then state should not be permitted to uphold a conviction which clearly violates its own law.

of its law, then malice aforethought would clearly be a fact and an essential element of the crime of murder. The State would have violated *Winship* in satisfying its burden of proof as to malice aforethought by a mandatory presumption.

II.

IT VIOLATED DUE PROCESS OF LAW TO CHARGE THE JURY IN THE PROSECUTION FOR MURDER IN THIS CASE THAT MALICE AFORETHOUGHT WAS TO BE PRESUMED BECAUSE THE TRIAL COURT DEFINED MALICE AFORETHOUGHT IN TERMS OF THE CONCEPT OF INTENTIONAL WHICH IS CLEARLY AN ELEMENT OF THE CRIME WHICH THE STATE MUST PROVE BEYOND A REASONABLE DOUBT PURSUANT TO *IN RE WINSHIP*, 397 U.S. 358 (1970).

Under the concept of felonious homicide, *intent* is an element of the crime and must be proven by the State beyond a reasonable doubt. However, in the charge, the element of intent is included within the trial court's definition of malice aforethought as shown by the following excerpts:

> What do we mean when we use the term malice aforethought? It means that there must be at least a momentary consideration before the killing. And a premeditated design to kill. Remember, for there to be murder there must be malice aforethought. But that malice aforethought may be either expressed or implied. Now, I'm explaining to you what express malice aforethought means. In a

> moment I'll tell you what implied malice aforethought means. Express malice aforethought means that there must be at least a momentary consideration before the killing, and a premeditated design to kill. (A. 41-42).
>
> * * *
>
> That malice aforethought is implied by law from any deliberate cruel act committed by one person against another suddenly or without a considerable provocation. (A. 43).
>
> * * *
>
> "Murder under our law is the unlawful killing of a human being with malice aforethought either express or implied. Malice aforethought does not necessarily mean that there must be a specific intent to kill. But our Court has laid down the rule as follows: In all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved to explain, qualify, or palliate the act, the law presumes it to have been done maliciously. And if the accused would reduce the crime below the degree of murder the burden is upon him to rebut the inference of malice, but which the law raises from the act of killing, by evidence in defense–". (A. 64-65).

The trial court then said that malice aforethought, or intent, is presumed unless the Defendant proves otherwise:

> So, if the evidence – well, so, if the unlawful killing was proved by the State beyond a reasonable doubt, and if there was nothing in the circumstances to explain anything palliating, then you'd find the defendant guilty of murder, because it would be presumed to have been done with malice aforethought. (A. 45).

Winship clearly forbids the placing of the burden of proof as to intent on anyone other than the State. The trial court did state that the State must prove intent beyond a reasonable doubt, but then he said, "I am going to leave for now my suggestion – my language concerning what the jury finding of what the defendant intended. I will be back to that later." (A. 37-38). He did come back to the question of intent, but, as shown by the above excerpts, he told the jury that, once the State proves certain facts, intent is to be presumed and the jury must return a verdict of murder unless the defendant meets his burden of proof. Thus the State satisfies its burden of proof as to intent by a presumption. Rebuttable presumptions which the jury may or may not apply are permitted under appropriate circumstances, but mandatory presumptions, such as used in this case, are not. *Leary v. United States*, 395 U.S. 6 (1969); *Tot v. United States*, 319 U.S. 363 (1943). There is no necessary connection between the proven facts and the presumed fact. A killing can just as easily be unintentional as intentional. Thus, notwithstanding the Maine Court's development of the concepts of felonious homicide and malice aforethought, the trial judge invoked a mandatory presumption on the issue of intent, thus relieving the State of its burden of proof on an element of the crime in violation of *Winship*.

In *State v. Wilbur, supra*, the Maine Court reviewed the charge and found that it complied with Maine law and did not violate any federal constitutional rights. Even if this Court decides that it must accept the Maine Court's interpretation of its law and its finding that the charge correctly applied that law, this Court must still review the charge to determine whether the Defendant

has received a fair trial. Certainly a fair trial requires that a jury be told of the rules of law in a way that clearly sets out any federally guaranteed rights. Under Maine law, intent is an element of the crime even under the concept of felonious homicide. *Winship* requires the State to prove, beyond a reasonable doubt, that the killing was intentional. It is a federal question to determine whether the charge in this case instructs the jury as to the proper allocation of the burden of proof pursuant to *Winship*. As shown above, notwithstanding that the charge may technically comply with Maine law, it certainly conveys an impression to the jury that malice aforethought, i.e. intent, is to be presumed upon proof of an unlawful killing. This charge violates the holding of *Winship*. Without reference to the charge, the State argues that the trial judge repeatedly told the jury that the State had to prove an intentional and unlawful killing, (see page 15 of State's brief). However, it is interesting to note that the jury returned twice for further instructions as to implied malice (A. 61-70) and heat of passion on sudden provocation (A. 70-77). In the further instructions on implied malice which certainly would be more clearly remembered by the jury when they returned to deliberate, the judge told them that "all unlawful killings are presumed to be with malice aforethought" (A. 61) and "when the jury is satisfied that the killing was an unlawful killing, then the defendant in such a case has the burden of satisfying the jury by a fair preponderance of the evidence that the killing was not with malice aforethought." (A. 62). He did not mention that the State must prove intention. Even in the original part of his charge, he talked about the State only proving an

unlawful killing. (A. 44, 45). The trial court defined unlawful as follows:

> Finally, the State must prove that the killing was an unlawful killing. I don't need to speak much to you about that, except to remind you, of course, knowing that you are thinking of all aspects of this case, that not all killings are unlawful killings. A soldier may lawfully kill in battle. A policeman may, under some conditions, lawfully kill if necessary to apprehend and subdue a prisoner. A person may lawfully kill in some conditions in self-defense. It is for a jury to say from all the facts whether a killing, if there was one, was a lawful killing. (A. 38).

Thus it becomes quite clear that the jury would have understood that once an unlawful killing had been established, intent was to be presumed. *Winship*, *Tot* and *Leary* do not permit the State to satisfy its burden of proof as to intent by a presumption and therefore the charge as would have been understood by the jury violated the Defendant's constitutional rights.

III.

IT VIOLATED DUE PROCESS TO CHARGE THE JURY IN THE PROSECUTION FOR MURDER IN THIS CASE THAT THE DEFENDANT HAD THE BURDEN TO PROVE HEAT OF PASSION ON SUDDEN PROVOCATION BECAUSE IT OFFENDS NOTIONS OF FUNDAMENTAL JUSTICE AND VIOLATES *IN RE WINSHIP*, 397 U.S. 358 (1970).

The First Circuit interpreted *In re Winship*, *supra* to require the State to disprove heat of passion on sudden

provocation.[8] In order to evaluate the correctness of that holding, it is necessary to examine the principles underlying the reasoning of *In re Winship*, *supra*. *Winship* applied the due process clause so as to require the State to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. In the present controversy, the State has attempted to distinguish *Winship* on the ground that the issues of malice aforethought and heat of passion do not bear on criminality, but only to punishment. Did *Winship* use the word crime with this distinction in mind or only because it was applicable to the facts of the case before the Court? "The latter implication seems more likely." *Comment*, *supra* at 81. Towards the conclusion of *Winship*, Justice Brennan cites Chief Judge Fuld's dissent in the New York Court of Appeals and holds

> "that, where a 12-year old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then as a matter of due process ... *the case* against him must be proved beyond a reasonable doubt ..." 397 U.S. at 368 (Emphasis supplied)

Thus it does not appear that the word "crime" should be accorded significant weight because the Court adopts the words "the case" at a later point. Furthermore, the nature of the *Winship* case refutes the State's position. *Winship* involved a charge of delinquency. The State

---

[8] The Maine Court recognized that this is the rule in the majority of jurisdictions. *State v. Wilbur*, 278 A.2d 139, 146 (1971) (A. 89).

attempted to argue that this was not a criminal proceeding. Justice Brennan rejected this argument on the basis of *In re Gault*, 387 U.S.1 (1967), and stated that "civil labels and good intentions do not themselves alleviate the need for criminal due process safeguards in juvenile courts." 397 U.S. at 365-66. Thus the holding of *Winship* was applied to a juvenile proceeding. The word "crime" should not be accorded any magical significance when determining the application of due process. This Court was concerned wth applying criminal due process standards to any judicial proceeding where justified by the facts. By examining the underlying interests justifying the application of the reasonable doubt standard to the facts of *Winship*, it becomes evident that those same interests and others compel the application of the reasonable doubt standard to the facts of this case.

Every court, since *Winship*, other than the Maine Court, that has considered the question of placing the burden of proof on the defendant to rebut the presumption of malice aforethought and to prove heat of passion upon sudden provocation has recognized that the holding of *Winship* renders the presumption unconstitutional. *State v. Cuevas*, 53 Haw. 110, 488 P.2d 322 (1971); *People v. Morrin*, 51 Mich. App. 301, 187 N.W.2d 434 (1971); *Commonwealth v. O'Neal*, 441 Pa. 17, 271 A.2d 497, 499 n.1 (1970). None of these courts have interpreted the common law as the Maine Court has done.

The reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship, supra* at 363. Justice Harlan, in concurring, also found the reasonable-doubt standard of

vital importance because of the necessity of reducing the chances of factual error to a minimum. *Id.* at 372-73. In the context of distinguishing between murder and manslaughter, the differences in consequences are so great that it is vital that procedure be such as to minimize the chances of error. By placing the burden of proof on a defendant to show heat of passion, the chances of error are not minimized but enlarged.

Winship was concerned with the fact that an accused could potentially be imprisoned if convicted and therefore it was important to minimize the chances of error. In Maine, a conviction of murder results in a mandatory life sentence, 17 M.R.S.A. §2651 (1964), whereas a conviction for manslaughter is limited to a maximum of twenty years with the discretion in the trial court to suspend the sentence. Although both murder and manslaughter may involve loss of liberty, the differences in the nature and extent of the incarceration are so significant that the rational of *Winship* is equally applicable. In those situations where probation is likely upon conviction of manslaughter, the difference is between freedom and imprisonment for life. *Comment, supra* at 83-84. Thus it is crucial to minimize the chances of error by applying the reasonable doubt standard to the issue of heat of passion on sudden provocation.

The State claims that *In re Winship* is not applicable to the punishment phase of the trial. However, in *State v. Ferris*, 249 A.2d 523 (Me. 1969), the Maine Court held that even though the matter of aggravation in an assault and battery case is only relevant to the question of punishment, it can have a significant impact on the sentence that a defendant receives. Therefore, the issue

should be decided by a jury and the state should have the burden of proving aggravation beyond a reasonable doubt. 249 A.2d at 528. Thus, in another area, the Maine Court has applied the *Winship* standard to a question of punishment. Following the logic of *Lafferty*, there could be a rule that all assault and batteries are presumed to be of a high and aggravated nature and the defendant must reduce the crime to simple assault and battery. Such a rule would be inconsistent with the reasoning of *Ferris*. Although the State argues that due process plays no part in the sentencing process, the *Ferris* Court rejected that proposition by deciding that, because of the significant impact on sentencing that the issue of aggravation has, due process requires trial by jury in the penalty phase. 249 A.2d at 527. The Maine Court found *Duncan v. Louisiana*, 391 U.S. 145 (1968), decisive on this question. The Maine Court did not distinguish *Duncan* on the grounds that it only related to the guilt or innocence phase rather than the penalty determination phase of the trial. The reasoning of *Duncan* tends to contradict the State's position in this case. The question of the due process right to jury trial depends upon the nature of the penalty which could be assessed. If the statutorily authorized length of the sentence controls the right to jury trial, then the possible length of sentence which is determined by a particular factual issue should also control the question of whether

the state must prove or eliminate the factual issue beyond a reasonable doubt.[9]

The second interest relied upon by *Winship* is the stigma which attaches to a conviction or finding of delinquency. *In re Winship, supra* at 363, 374. Certainly the whole concept of felonious homicide recognizes the distinctions which society makes between murder and manslaughter. The "*highest* degree of blameworthiness" is attached to a conviction of murder whereas the degree of blameworthiness is significantly lessened upon conviction of manslaughter. *State v. Lafferty, supra* at 672-73. Certainly this Court can take judicial notice of the differences in societal reaction to murder and manslaughter.

One could argue that it would be very difficult for the State to prove the lack of heat of passion beyond a reasonable doubt. *State v. Wilbur, supra* at 145. However, the same difficulty is faced by the State where self-defense is in issue and yet the Maine Court has said that, once put in issue, the State must disprove self-defense beyond a reasonable doubt. *State v. Millett*, 273 A.2d 504 (Me. 1971). Furthermore, in most instances, the facts which prove that a defendant killed the victim will also reveal many of the circumstances surrounding the death which will be relevant to the issue of heat of passion on sudden provocation. Thus the State's burden is not really

[9] Applying due process standards to this issue would not necessarily open the traditional sentencing process to due process restrictions. The issue of heat of passion on sudden provocation goes to determining the category of crime within which the traditional sentencing process operates. Thus the issue in this case is of a different magnitude than when the issues relate solely to the traditional sentencing process in which, historically, due process has had less application.

significantly increased. The whole theory behind the presumption of innocence is to require the State prove its case. A standard whose only purpose is to facilitate convictions runs counter to our system of criminal justice. *Wilbur v. Mullaney, supra* at 1307. This is not a case where the evidence necessary to prove the fact is contained entirely in the head of the defendant. Heat of passion on sudden provocation can be proven or refuted by external facts which both the state and the defendant have an equal chance of developing and introducing at the trial. Although heat of passion on sudden provocation may be partly subjective, objective facts are available which will support or refute the contention that a defendant was acting in the heat of passion. The type of provocation, which is an objective fact, has a direct bearing on whether the defendant was in the heat of passion. (A. 63-68). Did he act as a reasonable man would in similar circumstances? What was the provocation? What was the nature of the defendant's response? How much time separated the provocation from the response? Had the defendant sufficient time to cool off? These are all objective facts which have a direct bearing on the issue of heat of passion on sudden provocation.

Upon examination, it becomes evident that the rational of *Winship* is applicable to the issue in this case and, therefore, the State should be required to disprove heat of passion on sudden provocation. Obviously if there is no evidence of heat of passion on sudden provocation so that manslaughter is not a permissible verdict, then the State has no burden, but where there is any evidence which would permit a finding of voluntary manslaughter, the State should have the

burden of proving beyond a reasonable doubt that the defendant is guilty of murder by disproving that the killing was committed in the heat of passion on sudden provocation.[10]

CONCLUSION

Respondent respectfully submits that the Maine Court's concept of felonious homicide is so inconsistent with the spirit of prior Maine law that it should not be binding on this Court. However, even if binding, the First Circuit correctly applied the rules set forth in *In re Winship, supra*, because the Maine concept of

[10]Other due process violations are also present by placing the burden of proof on a defendant to prove heat of passion on sudden provocation when charged with murder. The Due Process Clause of the Fourteenth Amendment protects against violations of traditional notions of fundamental justice. *Palko v. Connecticut*, 302 U.S. 319 (1937). The application of the due process clause depends upon the facts of a particular case and the interests to be protected. If the State were only to charge a person with voluntary manslaughter, the burden would be on the State to prove that the killing was done in the heat of passion upon sudden provocation. 17 M.R.S.A. §2551 (1964). However, the State can completely avoid and shift the burden of persuasion on that issue by charging the person with murder. Under those circumstances, the defendant would have the burden of proving heat of passion upon sudden provocation and, if he cannot, he would be found guilty of murder. It would appear to be to the benefit of the State to always charge a person with murder because it can shift the burden of persuasion on heat of passion by doing so. This process is fundamentally unfair and can be avoided by requiring the State to prove its murder case by disproving heat of passion on sudden provocation. Under those circumstances the State would be required to make an election as to which is the proper charge to be brought and proved.

felonious homicide which assumes the worst and imposes the burden of proof on a defendant to prove a fact essential to the overall determination of the category of crime of which he is guilty violates the concepts of fundamental fairness protected by the Due Process Clause of the Fourteenth Amendment. Furthermore, Respondent contends that the trial judge's charge on intent creates a presumption which is forbidden by *Winship*, *Tot*, and *Leary*. Therefore, the judgment of the First Circuit should be affirmed.

Respectfully submitted,

PETER J. RUBIN, ESQUIRE
Bernstein, Shur, Sawyer & Nelson
One Monument Square
Portland, Maine 04111
Attorney for Respondent